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INTRODUCTION

During the period between September 1, 1996 and August 31, 1997, the Tenth Circuit Court of Appeals decided several cases concerning environmental issues. Of particular note[1] are three cases involving contribution suits brought under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[2] In the 1995 case *United States v. Colorado & Eastern Railroad Co.*,[3] the Tenth Circuit clarified the distinction between cost recovery suits brought under section 107 of CERCLA, and contribution suits under section 113.[4] The three cases decided this survey period further clarify the distinction made in *Colorado & Eastern*, but also indicate a lingering confusion regarding the relationship between section 107 cost recovery section 113 contribution actions.[5] Part I of this survey discusses the statutory and judicial background of CERCLA, including *Colorado & Eastern,* and then analyzes the holdings of each of the three recent Tenth Circuit cases on which this survey focuses.

The Tenth Circuit also decided a procedural standing case. The claim involved a challenge to the United States Forest Service's decision not to prepare an environmental impact statement before issuing a special use permit to a ski area corporation. Procedural standing, particularly when used to challenge forest plans under the National Forest Management Act, has generated much comment and confusion since the United States Supreme Court first mentioned, without fully explaining, the concept in *Lujan v. Defenders of Wildlife*.[6] Part II of this survey examines the Tenth Circuit interpretation of procedural standing in *Committee to Save the Rio Hondo v. Lucero*.[7] This decision clarifies much of the confusion, and may provide an opportunity for environmental plaintiffs to expand the use of procedural standing in the future.

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1. Also of note, but not discussed here, is *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (holding that Native American tribes could establish stricter water quality standards than federal standards, and that the EPA has the authority to require upstream dischargers to comply with the tribal standards. For a discussion of this case, see Timothy M. Reynolds, Tenth Circuit, *Indian Law*, 75 DENV. U. L. REV. 977, 996-1002 (1998).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1994).

3. 50 F.3d. 1530 (10th Cir. 1995). For a discussion of *Colorado & Eastern*, see Cameron R. Getto, Tenth Circuit Survey, *Environmental Law*, 73 DENV. U. L. REV. 753 (1996).

4. *Colorado & Eastern*, 50 F.3d at 154-36.

5. Indeed, the court in *Sun Co. v. Browning-Ferris, Inc.* commented, "For the third time in as many years, we are faced with the task of further defining and clarifying the relationship between §§ 107 and 113 of [CERCLA]." 124 F.3d 1187, 1188 (10th Cir. 1997).

6. 504 U.S. 555 (1992).

7. 102 F.3d 445 (10th Cir. 1996).

I. CERCLA COST RECOVERY AND CONTRIBUTION CLAIMS

A. *Background*

CERCLA is one of the most powerful and expansive environmental statutes ever legislated.[8] It is designed to provide for prompt cleanup of contaminated sites, or sites that are threatened with contamination from the release of hazardous substances.[9] The power of CERCLA lies in the fact that individuals or corporations may be held entirely liable for these expensive cleanups.[10] CERCLA authorizes the United States Environmental Protection Agency (EPA) to rehabilitate contaminated sites either by using Superfund monies,[11] or by ordering any responsible person to perform the cleanup.[12] If EPA cleans the site, it may still seek recovery of its costs by bringing a section 107 "cost recovery" suit against any person deemed liable under that section.[13] To attach personal liability, the EPA need only show that the party is a past or current owner of the contaminated site, or a person who arranged for hazardous substances to be disposed at, or transported to, the contaminated site.[14] Anyone belonging to this group of potentially liable persons is known as a potentially responsible party (PRP). Since CERCLA sites often have a complex history of ownership and waste disposal, there may be a large number of PRPs for each site.[15]

Although legislative history reveals that Congress expressly avoided delineating CERCLA liability as strict, and joint and several,[16] courts quickly agreed that liability for cleanup costs incurred by the government was both strict,[17] and joint and several[18] unless a defendant could prove

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8. There are currently over 1,200 sites listed on the National Priorities List (NPL). 40 C.F.R. pt. 300 (1997). In 1994 the average cost of CERCLA cleanup was estimated at $40 million per site. Steven Ferrey, *Allocation and Uncertainty in the Age of Superfund: The Redistribution of CERCLA Liability*, 3 N.Y.U. ENVTL. L.J. 36, 37 (1994).

9. *See* H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20.

10. *See* CERCLA § 111, 42 U.S.C. § 9611 (1994).

11. *See id.* (governing the use of Superfund).

12. *See* CERCLA §§ 104(a), 106(a), 42 U.S.C. §§ 9604(a), 9606(a) (1994).

13. *See* CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1994).

14. *See* CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. § 9607(a)(1)-(4)(A) (1994)

15. *See, e.g.*, Sun Co. (R & M) v. Browning-Ferris, Inc., 124 F.3d 1187, 1189 (10th Cir. 1997) (involving a contaminated landfill site where the EPA identified dozens of companies that had used the site to dispose of hazardous substances).

16. For a discussion of Congress's intent to allow courts to determine CERCLA liability, see Cathleen Clark, Comment, *Should the Butcher, the Baker and the Candlestick Maker Be Held Responsible for Hazardous Waste?*, 1994 UTAH L. REV. 871, 877-80 (1994).

17. A close reading of the statute supports this interpretation; section 107(a) attaches liability to owners, operators, arrangers, and transporters without regard to causation and provides for only limited defenses in section 107(b). CERCLA § 107(a), (b), 42 U.S.C. § 9607 (a), (b) (1994).

18. Under CERCLA's joint and several liability provision, one defendant may be held liable for the entire cost of cleanup, regardless of its fair share, or that other parties are known to have

divisible harm.[19] This, however, is often very difficult to prove.[20] As a result, this joint and several liability can cause gross inequities because one party may be singled out and held responsible for all of the cleanup costs even though it disposed of only a small fraction of the hazardous substances at the site.[21]

To mitigate the harshness of CERCLA liability, courts implied a right of contribution for parties responsible for cleanup costs[22] from other responsible parties.[23] In 1986, when Congress re-authorized CERCLA, it expressly provided for the right of contribution in section 113.[24] Far from quieting all controversy, section 113 has become the source of much confusion and divergent opinion;[25] it may be the greatest source of litigation in CERCLA cases.[26]

CERCLA initially only provided for cost recovery under section 107, which provides that any PRP shall be liable for "all cost of removal or remedial action incurred by the United States Government . . . [and] any other necessary costs of response incurred by *any other person* . . . ."[27] Section 107 liability is strict, and joint and several.[28] Under section

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contributed to the contamination. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983).

19. Damages for harm are to be apportioned among two or more causes only where there are distinct harms, or a reasonable basis for determining the contribution of each cause to a single harm. United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) (quoting RESTATEMENT (SECOND) OF TORTS § 433A (1965)).

20. *See, e.g.*, United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993) (holding that even though defendant's waste contained levels of hazardous waste below naturally occurring background levels, defendant could not prove the harm was divisible when its waste commingled with the hazardous waste of other contributors). *But see* United States v. Bell Petroleum Servs., 64 F.3d 202 (5th Cir. 1995) (holding harm was divisible where a single hazardous substance, chromium, entered a sealed aquifer as the result of similar operations by three parties at mutually exclusive times; harm was proportionate to the volume of chromium-contaminated water each had discharged into the environment).

21. United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1535 (10th Cir. 1995). Under joint and several liability, the EPA can collect all the cleanup costs (including any insolvent PRPs' share, known as "orphan shares") from any single PRP. Thus, the EPA need only find one "Fortune 500" company to ensure recovery of all cleanup costs at a site. William D. Evans Jr., *The "Road Warrior" Quality of Superfund Contribution Litigation*, 32 TENN. BUS. J. 26, 28 (1996).

22. Contribution under CERCLA provides equitable apportionment, whereby a party is entitled to relief from other PRPs to the extent that it can demonstrate the divisibility of harm and that it paid more than its fair share. *Colorado & Eastern*, 50 F.3d at 1535-36.

23. David L Bearman, Note, *CERCLA—Cost Recovery, Contribution and Statutes of Limitations: Working Toward a Solution*, 27 U. MEM. L. REV. 149, 154 (1996); *see, e.g.*, Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985) (holding that the right to contribution under a federal statute may arise in either of two ways: through the creation of a right of action by Congress expressly, or by clear implication; or through the power of the federal courts to fashion a federal common law of contribution).

24. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1994).

25. *See* Evans, *supra* note 21, at 29-30. The split appears to be mostly at the trial court level. Among the circuit courts that have addressed the issue, all have held that actions for reapportionment of costs between PRPs are ones for contribution. *Id.*

26. *Id.*

27. CERCLA § 107(a)(4)(A)-(B), 42 U.S.C. §§ 9607(a)(4)(A)-(B) (1994) (emphasis added).

113, however, contribution actions are governed by equitable factors.[29] For this reason, a liable PRP would clearly prefer to recover the costs of cleanup from other PRPs under the provisions of section 107 rather than section 113, since joint and several liability would allow the liable party to recover the full cost of the cleanup, not just the amount paid in excess of its equitable share.[30] Section 107 provides an additional benefit in the form of a six year limitations period, whereas contribution claims are generally barred after three years.[31]

Despite the "any other person" language in section 107, liable PRPs attempting to use the section 107 "cost recovery" provision have generally not been allowed to do so.[32] The Tenth Circuit addressed this issue in *United States v. Colorado & Eastern Railroad*,[33] concluding that any claim reapportioning costs between PRPs is the "quintessential claim for contribution," and thus governed by section 113.[34]

Subsequent Tenth Circuit cases have held that, in a contribution action, the liability of a defendant must first be determined according to the categories set forth in section 107 (owners, operators, arrangers, and transporters) before apportionment can be determined by equitable factors.[35] The Tenth Circuit decisions build upon this important point to answer the more specific question: which costs are recoverable in a contribution suit.[36]

The Tenth Circuit also recently considered the statute of limitations period that should apply to contribution suits brought by PRPs incurring

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28. *See supra* notes 16-19 and accompanying text.

29. *See* United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 n.5 (10th Cir. 1995). Courts may consider several equitable factors when apportioning costs, known collectively as the "Gore factors" after an unsuccessful amendment to CERCLA offered by then-Congressman Al Gore.

> The Gore factors include 1) the ability of the parties to demonstrate that their contribution can be distinguished, 2) the amount of hazardous substance involved, 3) the degree of toxicity of the hazardous substance, 4) the degree of involvement by the parties in generation, transportation, treatment, storage, or disposal, 5) the degree of care exercised by the parties taking into account the characteristics of the hazardous substance, and 6) the degree of cooperation by the parties with government officials to prevent harm.

ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 367 (2d ed. 1996).

30. A section 107 cost recovery claim allows recovery for *all* necessary response costs, while contribution allows only for reapportionment of costs where it is possible to determine each party's fair share of the harm caused using equitable factors such as the Gore factors. *Colorado & Eastern*, 50 F.3d at 1536.

31. CERCLA § 113(g)(2)-(3), 42 U.S.C. § 9613(g)(2)-(3) (1994).

32. In the Tenth Circuit, see *Colorado & Eastern*, 50 F.3d at 1530.

33. *Id.* at 1536.

34. *Id.* For a discussion of the distinction between cost recovery claims and contribution claims, see Getto, *supra* note 3, at 755.

35. "Recovery of response costs by a private party under [CERCLA] is a two-step process." Bancamerica Commercial Corp. v. Mosher Steel, 100 F.3d 792, 800 (10th Cir. 1996).

36. See discussion *infra* Part I.B.

costs due to compliance with section 106 administrative orders,[37] instead of as a result of settlements (consent decrees)[38] with, or cost recovery suits by, the EPA.[39] The issue arises because the limitations period that section 113(g)(3) provides for in contribution actions sets forth four specific triggers, none of which occur when a PRP begins cleanup in response to a section 106 administrative order, and later seeks contribution from other PRPs.[40]

No other circuit court has considered this question.[41] The First Circuit did suggest in a footnote the possibility of a PRP who "spontaneously initiates" a cleanup (the so-called "innocent PRP") pursuing a cost recovery claim under section 107.[42] The court declined to rule on the limitations issue; rather, it cautiously noted that "it is unclear to us whether such a cause of action would be subject to the three-year or the six-year prescriptive period."[43] The court, however, believed that situations existed where a PRP might bring a cost recovery (section 107) action instead of a contribution (section 113) action, and thus receive a six year limitations period. In the Tenth Circuit, however, that possibility may not exist because of the court's holding in *Colorado & Eastern* that limits a PRP to a section 113 contribution suit when seeking to recover costs of cleanup.[44]

Although the circuit courts have not considered the statute of limitations period directly, several district courts have recently held that parties complying with a section 106 administrative order did not trigger the three year statute of limitations for contribution actions.[45] Such parties

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37. Section 106 of CERCLA provides that the President may issue such orders as necessary to protect public health, welfare, and the environment where contamination of the environment by hazardous substances is found to be an imminent and substantial public or environmental endangerment. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1994). This authority has been largely delegated to the EPA, which may issue an administrative order or obtain an order from a federal district court. *Id.*

38. Section 122 of CERCLA allows the EPA to enter into settlement agreements, known as consent degrees, with PRPs to facilitate the cleanup of contaminated sites. CERCLA § 122(a), 42 U.S.C. § 9622(a), (d) (1994).

39. *See* discussion *infra* Part I.B.3.

40. "[N]o action for contribution for any response costs or damages may be commenced more than three years after" the date of any action for the recovery of costs, or the date of a consent decree or judicially approved settlement. CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (1994).

41. Search of Westlaw database (December, 1997). *See* Aaron A. Garber, Note, *The PRP, the Section 106 Administrative Order, the Contribution Claim, and CERCLA's Statute of Limitations: A Complete Statutory Analysis*, 16 TEMP. ENVTL. L. & TECH. J. 115, 116-17 (1997).

42. United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 99 n.8 (1st Cir. 1994).

43. *Id.*

44. United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1539 (10th Cir. 1995). *Colorado & Eastern* may be distinguished, however, because in that case, the PRP seeking contribution had been found liable under section 107, whereas in *United Tech.*, the PRP's liability had not been proven.

45. *See* Gould, Inc. v. A & M Battery & Tire Serv., 901 F. Supp. 906 (M.D. Pa. 1995); Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516 (D. Utah 1995); Reichhold Chem., Inc. v. Textron, Inc., 888 F. Supp. 1116 (N.D. Fla. 1995); *see also* Garber, *supra* note 41, at 116-17.

may have an indefinite period of time in which to bring a contribution claim.[46] For example, the court in *Ekotek Site PRP Committee v. Self* relied on the plain language of the statute, and the equitable argument that a PRP entering into an administrative order with the EPA does not know its total liability for the cleanup. The court concluded that it would be unfair to commence the statute of limitations period for a contribution claim before ascertaining the party's liability.[47]

B. *Tenth Circuit Cases*

1. *Bancamerica Commercial Corp. v. Mosher Steel, Inc.*[48]

a. *Facts*

Bancamerica owned an industrial site found to be heavily contaminated with lead and other hazardous substances.[49] The site had several previous owners and operators,[50] including ASARCO, who owned and operated a lead smelter at the site from 1899 to 1902.[51] From 1907 to 1984, nonparties to the suit operated a steel fabrication facility on the site.[52] In 1984, Bancamerica purchased the site, whereupon it was immediately leased to Trinity Industries, a subsidiary of Mosher Steel.[53] Trinity used large amounts of lead-based paints and solvents at the site until the lease was canceled in 1987.[54] Upon termination of the lease, Bancamerica discovered that the site was heavily contaminated with lead originating from lead smelter ash left by ASARCO, and lead-based paint left by the nonparties and Trinity.[55]

In 1990, the Environmental Protection Agency (EPA) entered into a settlement with Bancamerica that required the latter to begin cleanup of the site.[56] In 1991, the EPA issued an administrative order[57] under CERCLA section 106 to ASARCO, which required it to assist in the cleanup.[58] Bancamerica and ASARCO completed the cleanup and later filed suit seeking contribution from Trinity under CERCLA section 113.[59] The district court held Trinity partially responsible for the contamination

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46. Garber, *supra* note 41, at 116-17.
47. *Ekotek*, 881 F. Supp. at 1523.
48. 100 F.3d 792 (10th Cir. 1996).
49. For a detailed summary of the facts, see Bancamerica Commercial Corp. v. Trinity Indus., 900 F. Supp. 1427, 1435-50 (D. Kan. 1995).
50. *Bancamerica*, 100 F.3d at 795.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *See supra* note 33.
58. *Bancamerica*, 100 F.3d at 795.
59. *Id.*

and ordered it to reimburse Bancamerica and ASARCO $555,293 for cleanup expenses attributable to its conduct.[60]

b. *Decision*

Bancamerica and ASARCO appealed the decision, claiming that the district court erred by refusing to grant prejudgment interest.[61] Additionally, Bancamerica argued that the court erred by solely considering toxicity and volume to allocate responsibility and liability for cleanup of the lead contamination.[62] Trinity also raised several issues on appeal, including: 1) whether EPA orders required Bancamerica and ASARCO to meet the public comment requirements of the national contingency plan (NCP),[63] and 2) whether Bancamerica was entitled to recover the costs it incurred in 1988 and 1989, prior to entering into a settlement with EPA.[64]

Trinity claimed that Bancamerica and ASARCO did not comply with provisions in the EPA orders that stated all required actions must be undertaken in accordance with applicable federal laws. Trinity argued that under these provisions, Bancamerica and ASARCO were required to comply with the NCP[65] regulations that established public comment requirements.[66]

In affirming the district court's ruling that the orders did not require Bancamerica and ASARCO to comply with the NCP's public comment requirements, the Tenth Circuit relied on an NCP provision stating, "[a]ny response action carried out in compliance with the terms of an order issued by [EPA] pursuant to section 107 of [CERCLA] . . . will be considered consistent with the [NCP]."[67] The court also noted that in drafting the 1990 contingency plan, the EPA required section 106 orders to contain the cleanup standards necessary to maintain consistency with the NCP.[68]

Trinity claimed an additional error was made by the district court in its failure to determine whether the cleanup was a "removal" or "reme-

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60. *Id.*

61. *Id.*

62. *Id.* at 795-96.

63. The national contingency plan requires private parties engaged in cleanup to provide the general public an opportunity to comment on the selection of the response action. 40 C.F.R. §§ 300.415(n), 300.430(f)(3) (1997). *See* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1514 (10th Cir. 1991).

64. This issue was decided in favor of Bancamerica, because Trinity failed to raise it with the district court. *Bancamerica*, 100 F.3d at 798.

65. The president is authorized by 42 U.S.C. § 9605 (1994) to establish NCP procedures and standards for cleaning up contaminated sites. *See* 40 C.F.R. § 300.1 (1997).

66. *Bancamerica*, 100 F.3d at 796.

67. 40 C.F.R. § 300.700(c)(3)(ii) (1997).

68. *See* 55 Fed. Reg. 8666, 8797-98 (1990) (stating that section 106 orders governing private persons might not contain all of the public participation requirements of the NCP).

dial" action.[69] Trinity claimed this was necessary before the court could decide whether the cleanup was consistent with the NCP.[70] The argument was rendered irrelevant, however, by the court's earlier holding that actions performed in accordance with section 106 orders are consistent with the NCP.[71]

Bancamerica and ASARCO contended the district court erred in refusing to grant them prejudgment interest on those response costs for which the court held Trinity liable.[72] They asserted that CERCLA section 107 mandates the award of such interest.[73] Trinity countered with the argument that Bancamerica and ASARCO's claim for contribution was properly brought under section 113, not section 107, and that section 113 does not provide for the award of prejudgment interest.[74] The court, however, interpreted CERCLA as requiring an award of prejudgment interest in both section 113 and section 107 actions.[75]

In reaching this conclusion, the court reviewed the differences between a section 107 cost recovery claim and a section 113 contribution claim; it then decided that Bancamerica and ASARCO had asserted section 113 contribution claims because their actions were for cost apportionment between PRPs.[76] The court reasoned that any section 113 claim must, by necessity, incorporate the liabilities established in section 107.[77] The court noted that recovery of response costs by a private party under CERCLA is a two-step process. Initially, a plaintiff must prove that the defendant is liable under section 107(a). Once that is accomplished, the question is the portion of the response costs for which each defendant will be responsible under section 113.[78]

Section 107(a) states "[t]he amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D)."[79] Even though section 107 apparently refers only to "actions under this section," the court reasoned that because a section 113 contribution claim necessarily incorporates the liability pro-

69. 42 U.S.C. § 9601(23), (24) (1994). CERCLA distinguishes a removal as a short-term and immediate response, while a remedial action may involve additional or different steps consistent with a permanent remedy.

70. *Bancamerica*, 100 F.3d at 796. The NCP's regulations governing remedial actions are more stringent than those governing removal actions. Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 475 (E.D. Mich. 1993).

71. *Bancamerica*, 100 F.3d at 797.

72. *Id.* at 799.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 800.

77. *Id.*

78. *Id.* (quoting Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 934-36 (8th Cir. 1995)).

79. *Id.* (quoting 42 U.S.C. § 9607(a) (1994)).

visions of section 107, "a § 113(f) action for contribution is an action under § 107."[80]

To grant prejudgment interest is consistent with logic and policy, the court asserted, because to do otherwise would result in parties undertaking cleanup "losing the time value of money they spent on behalf of other liable persons, [while] those persons will have gained an equal amount."[81] Thus, it would create incentive for private parties to undertake cleanup actions later, rather than sooner, since they would gain the time value of money by delaying.[82] The court noted that this holding was consistent with other decisions.[83] The court also determined that Bancamerica and ASARCO were both entitled to prejudgment interest because they satisfied the section 107(a) requirement that a demand for payment be made in writing.[84]

Bancamerica and ASARCO next argued that the district court erred in considering only toxicity and volume when allocating liability for the site's lead contamination. The court of appeals started with section 113(f)(1): A court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[85] It further stated that when considering reapportionment, "a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of the circumstances presented to the court."[86] The court found no error in the district court's consideration of only the factors of volume and toxicity when allocating liability.[87]

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80. *Id.* at 801.

81. *Id.*

82. *Id.*

83. *Id.*; *see, e.g.*, Bell Petroleum Servs. Inc. v. Sequa Corp., 3 F.3d 889, 908 (5th Cir. 1993) (noting that 42 U.S.C. § 9607(a)(4) expressly provides for prejudgment interest); Browning-Ferris Indus. v. Ter Maat, 1996 WL 67216, at *5 (N.D. Ill. Feb. 16, 1996) (noting the express language of 42 U.S.C. § 9607, and citing *Bell Petroleum*).

84. *Bancamerica*, 100 F.3d at 801. Section 107(a) states: "interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1994). Bancamerica satisfied the writing requirement with a letter sent to Trinity stating that it had incurred $45,818 for environmental work performed on the site, and that it believed Trinity to be liable for these costs. *Bancamerica*, 100 F.3d at 801. ASARCO satisfied the written demand requirement when it filed the third amended complaint notifying Trinity that it had incurred costs "in excess of $1 million," for which it was seeking reimbursement. *Id.*

85. *Bancamerica*, 100 F.3d at 802; CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1) (1994).

86. *Bancamerica*, 100 F.3d at 802-03 (quoting United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 (10th Cir. 1996)).

87. *Id.* at 803.

2. *Atlantic Richfield Co. v. American Airlines, Inc.*[88]

a. *Facts*

In *Atlantic Richfield Co. v. American Airlines, Inc.*, a site became contaminated with oil sludge as a result of the operation of a waste-oil reclamation business by tenants on the Glenn Wynn site, part of a larger refinery near Tulsa, Oklahoma.[89] Atlantic Richfield Company (ARCO) acquired part interest in the site in 1969, which it sold in 1987.[90] In 1986, the area was identified as a Superfund site requiring excavation and off-site thermal destruction of the sludge.[91]

The EPA and ARCO negotiated a settlement under which ARCO agreed to undertake cleanup of the site and to pay the EPA's response and future oversight costs relating to implementation of that remedy.[92] The site was cleaned up by 1993, after which ARCO brought consolidated contribution actions against other PRPs, including companies whose waste oil had been delivered to the site.[93] These defendants stipulated to liability for their proportionate share of the costs of cleaning up the site, but argued that ARCO was not entitled to recover the attorney's fees it incurred in negotiating the settlement, nor the costs of EPA's oversight of the cleanup.[94]

The district court determined that ARCO could not recover litigation attorney's fees, but could recover those fees it incurred negotiating the consent decree.[95] It also allowed ARCO to recover the costs it paid to EPA for overseeing the cleanup according to the terms of the settlement.[96] The defendants appealed the court's ruling on recovery of oversight costs, and ARCO cross-appealed the court's failure to award attorney's fees incurred in locating PRPs, and the court's apportionment of fees paid to the settlement judge.[97]

b. *Decision*

The Tenth Circuit affirmed that ARCO was entitled to recover its payment of the EPA's oversight costs, holding that they were part of "response" costs for which PRPs are liable under CERCLA section 107, and may be reapportioned among PRPs in a section 113 contribution

88. 98 F.3d 564 (10th Cir. 1996).

89. *Atlantic Richfield*, 98 F.3d at 566. The waste-oil reclamation business was operated from 1964 to mid-1982.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 555.

suit.[98] The court, however, reversed the holding that allowed recovery of attorney's fees incurred by ARCO in negotiating the settlement. [99] The court noted that nonlitigation attorney's fees were recoverable, but disallowed ARCO's cross-appeal for attorney's fees incurred in locating PRPs because ARCO had not raised the issue during trial.[100] The court also affirmed the district court's ruling that ARCO and the collective defendants should each pay 50% of the settlement judge's expenses.[101]

In ruling that EPA oversight costs were recoverable in contribution claims under section 113, the court of appeals explained that a liable party may seek contribution from any other PRP who is found liable under section 107.[102] Since section 107 establishes the liability of a PRP and section 107(a)(4)(B) provides that PRPs are liable for any other necessary cost of remedial action incurred by any other person,[103] the court examined the definition of remedial action to determine if it included oversight costs.[104]

Section 101(24) defines remedial actions as "those actions consistent with permanent remedy . . . [and] the term includes any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment."[105] Using the ordinary meaning of monitoring—to regulate or oversee—the court found that government oversight of private party cleanup efforts was synonymous with monitoring, and necessary to "protect the public health, welfare, and environment."[106] Thus, the cost of oversight was recoverable.[107]

The defendants argued that the Third Circuit, in *United States v. Rohm & Haas Co.*,[108] had found that oversight costs were not costs of removal and, therefore, not recoverable under section 107.[109] Calling the decision questionable,[110] the Tenth Circuit noted that most of the district

98. *Id.* at 571.
99. *Id.*
100. *Id.*
101. *Id.* at 571-72.
102. *Id.* at 567.
103. CERCLA § 107(a)(4)(B); 42 U.S.C. § 9607(a)(4)(B) (1994).
104. *Atlantic Richfield*, 98 F.3d at 569.
105. *Id.* (quoting 42 U.S.C. § 9601(24) (1994)).
106. *Id.* at 570.
107. *Id.* at 569-70.
108. 2 F.3d 1265, 1271 (3d Cir. 1993).
109. *Rohm & Haas*, 2 F.3d at 1271. The court relied on a Supreme Court opinion, *Skinner v. Mid-America Pipeline Co.*, that stated "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes' on those parties." 490 U.S. 212, 224 (1989). In *Rohm & Haas*, the court concluded that the costs incurred by the government were administrative costs not inuring directly to the benefit of that party, but rather to the public at large. *Rohm & Haas*, 2 F.3d at 1273.
110. *Atlantic Richfield*, 98 F.3d at 568.

courts outside the Third Circuit had declined to follow it.[111] It also found that the Third Circuit had only held that oversight costs were not a "removal" action.[112] The Tenth Circuit noted that the definition of remedial action, at issue in *Atlantic Richfield*, was much broader than that of removal action, and clearly allowed recovery of government oversight costs in private party remedial actions.[113]

The court next held that nonlitigation attorney's fees necessary to the cleanup (such as the cost of locating other PRPs) were recoverable.[114] The court refused to award ARCO the costs of locating PRPs, however, because it had failed to raise the issue at trial.[115] The court also declined ARCO's appeal that, as a prevailing party, ARCO should be awarded its share of the fees and expenses it paid to the settlement judge.[116] The court deferred to the district court's ruling that ARCO and the defendants should share these expenses equally, since each side benefited from those services.[117]

3. *Sun Co. (R & M) v. Browning-Ferris, Inc.*[118]

a. *Facts*

In *Sun Co. (R & M) v. Browning-Ferris, Inc.*, the contaminated site was an abandoned limestone quarry operated as a landfill in which hazardous materials were disposed, and later seeped into the soil and water surrounding the site.[119] The EPA placed the site on the National Priority List (NPL)[120] and identified Sun Company as a PRP because it had con-

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111. *Id.*; *see, e.g.*, Town of New Windsor v. Tesa Tuck, 935 F. Supp. 317, 324-27 (S.D.N.Y. 1996); California v. Celtor Chemical Corp., 901 F. Supp. 1481, 1489-90 (N.D. Cal. 1995); *see also* Patrick M. Flynn, Comment, *Government Recovery of Superfund Cleanup Oversight Costs: A Critique of* United States v. Rohm & Haas Co., 47 RUTGERS L. REV. 789 (1995).

112. *Atlantic Richfield*, 98 F.3d at 568-69.

113. *Id.*

114. *Id.* at 571 (citing Key Tronic Corp. v. United States, 511 U.S. 809, 919 (1994) (finding that attorney's fees incurred in identifying other potentially responsible parties are recoverable as a necessary cost of response)).

115. *Id.* ARCO claimed it did not raise the issue at trial because it thought the court's pretrial ruling had precluded it from so doing. The court of appeals, however, ruled that the district court's ruling did not prevent ARCO from raising the issue. The court had simply found that litigation fees were not recoverable, while nonlitigation fees necessary to the cleanup were. *Id.*

116. *Id.* at 571-72. ARCO argued that the judge was a special master, and as a prevailing party, ARCO was entitled to an award of its share as part of its costs. The court ruled that under Federal Rule of Civil Procedure 53(a), district courts have discretion to apportion the compensation of a special master among the parties. The district court reasoned that both sides benefited from the services of the settlement judge. Therefore, the district court did not abuse its discretion by deciding each side should pay half the costs incurred. *Id.* at 572.

117. *Id.*

118. 124 F.3d 1187 (10th Cir. 1997).

119. For a detailed summary of the facts, see *Sun Co. (R & M) v. Browning-Ferris, Inc.*, 919 F. Supp. 1523, 1527-28 (N.D. Okla. 1996).

120. 42 U.S.C. § 9605(e) (1994) authorizes the EPA to identify and rank contaminated hazardous waste sites. The worst sites are listed in the NPL at 40 C.F.R. part 300, app. B (1997).

tributed hazardous waste to the site.[121] After attempts to negotiate a consent decree failed, the EPA issued a unilateral administrative order pursuant to section 106 of CERCLA[122] compelling Sun to pay for the costs of remediation.[123] Sun completed remediation and incurred $6.2 million in cleanup costs.[124] It was then able to identify other PRPs, and brought section 107 cost recovery, and section 113 contribution, claims against these PRPs.[125] The defendants then filed a motion for summary judgment.

b. *Decision*

The district court granted the defendant's motion for summary judgment on the section 107 claim, holding that Sun's claim was for an equitable apportionment, and was therefore a contribution claim under section 113.[126] The court of appeals affirmed,[127] leaving the length of the limitations period that should be applied to the contribution suit to be determined.[128] Section 113(g)(3) provides a three-year limitation period for contribution suits brought after any action for recovery of costs, or a settlement concerning the cleanup, has occurred.[129] Sun, however, undertook cleanup action in response to a section 106 administrative order; there was no settlement or civil action prior to this suit.[130] As a result, none of the triggering events provided for in section 113(g)(3) had occurred before Sun brought its suit for contribution.[131]

The district court found that this anomaly was the result of an inadvertent omission on the part of Congress, and thus turned to another area of federal contribution law to hold that Sun's cause of action had accrued when it paid more than its equitable share of the cleanup costs.[132] As a result, most of Sun's contribution claims were time-barred.[133]

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121. *Sun*, 124 F.3d at 1189.

122. CERCLA § 106, 42 U.S.C. § 9606 (1994), authorizes the EPA to issue such orders as necessary to protect public health, welfare and the environment from imminent endangerment.

123. *Sun*, 124 F.3d at 1189.

124. *Id.*

125. *Id.*

126. *Id.* The court cited United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 (10th Cir. 1995). For a discussion of *Colorado & Eastern* relating to cost recovery and contribution actions see *supra* notes 29, 30, and accompanying text.

127. *Sun*, 124 F.3d at 1190.

128. *Id.*

129. CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) (1994) provides a three year limitations period for actions that commence after judgment in any action under section 9613 (contribution actions for recovery of such costs or damages, or an administrative order under section 9622(g), and de minimus settlements, or section 9622(h) (cost recovery settlements), or entry of a judicially approved settlement with respect to such costs and damages.

130. *Sun*, 124 F.3d at 1190.

131. *Id.*

132. *Id.*

133. *Id.*

The court of appeals, however, found that the district court had erred by importing other contribution law into its decision.[134] Instead, CERCLA section 113(g)(2) was applicable because no civil action or settlement had commenced.[135] Therefore, Sun's contribution claim was an "initial action" for recovery of costs that was governed by a six year limitations period under section 113(g)(2).[136]

Browning-Ferris argued that section 113(g)(2) should apply only to section 107 cost recovery actions that are governed by strict, and joint and several liability, and thus not available to Sun as a PRP seeking contribution.[137] The court of appeals rejected this argument. It noted that although section 113(g)(2) is subtitled "Actions for recovery of costs," and refers only to actions within section 107, the *Bancamerica*[138] opinion established that a section 113(f) action for contribution is an action under section 107.[139] Because no settlements had been entered into, and previous actions for the site had been filed under section 107, Sun's action for equitable apportionment was an "initial action" for the recovery of such costs.[140] The court found that this interpretation gave meaning to each provision of section 113(g) and was not inconsistent with Congress' intent to provide a three year limitations period for contribution actions filed after the four events enumerated in section 113(g)(3).[141] The court reasoned that if the contribution suit was not an initial action, then a previous action must have been filed, thus one of the triggering events in section 113(g)(3) would have occurred, and the three year limitations period would be invoked.[142]

The court made it clear that the statutory language permits two types of contribution actions, governed by different statutes of limitations.[143] First, if a PRP incurs its cleanup costs pursuant to a civil action under section 106, section 107, or a resulting settlement, the PRP has three years from the date of judgment or settlement in which to bring its contribution claim. Second, if the PRP incurred its cleanup costs in some other way, such as responding to an EPA order rather than a court order, the PRP has six years from the start of remediation in which to bring suit. The court noted, however, that it left undecided whether PRPs who assert

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134. *Id.*

135. *Id.* at 1192.

136. *Id.* 42 U.S.C. § 9613(g)(2) (1994) provides: "An *initial action* for recovery of costs referred to section 9607 must be commenced . . . (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . ." (emphasis added).

137. *Sun*, 124 F.3d at 1192.

138. Bancamerica Commercial Corp. v. Mosher Steel, 100 F.3d 792, 801 (10th Cir. 1996).

139. *Sun*, 124 F.3d at 1192.

140. *Id.*

141. *Id.* at 1192-93.

142. *Id.* at 1193.

143. *Id.* (citing Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994) ("recognizing two 'similar and somewhat overlapping' contribution actions under sections 107 and 113")).

their innocence with regard to any waste at a site may be able to recover all of their costs from other PRPs in an action under section 107.[144]

C. *Other Circuits*

Most circuits that have addressed this issue agree that an action between PRPs is one for contribution and thus governed by equitable factors, not strict, and joint and several liability.[145] For example, in *Pinal Creek Group v. Newmont Mining Corp.*,[146] the Ninth Circuit reversed a district court decision to deny the defendant's motion to dismiss claims brought by a PRP seeking to recover the totality of response costs from other PRPs under joint and several liability.[147] The court acknowledged that bringing a contribution claim necessarily involves establishing the defendant's liability under section 107, but still found that recovery is governed by equitable apportionment under section 113, not the joint and several liability provisions of section 107.[148]

The Seventh Circuit, however, has made an exception to the rule that claims by one PRP against another must normally be brought as contribution claims under section 113. In *Akzo Coatings, Inc. v. Aigner Corp.*,[149] the court recognized that a PRP may bring a section 107 cost recovery claim if it is not responsible for any of the contamination.[150] The Seventh Circuit later clarified that the exception applies in cases where it is factually uncertain whether the PRP is partially responsible for contaminating the site. In *Rumpke, Inc. v. Cummins Engine Co.*,[151] the court held that the owner of a recently acquired landfill (a PRP under CERCLA section 107(a)(1)) alleging that it did not pollute the site could initially bring a section 107 cost recovery action against defendant PRPs.[152] If the facts establish that the owner was partially responsible for the contamination, however, that owner may only proceed in a claim for contribution.[153] The Third Circuit has also held that section 107 cost recovery claims may be brought by innocent parties that have undertaken cleanups.[154] Other courts have acknowledged that a class of cases might exist in which a PRP might sue under section 107, but have yet to rule on

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144. *Sun*, 124 F.3d at 1191 n.1.

145. Jose R. Allen & Karen L. Peterson, *Private Party Litigation Under Superfund: Claims for Cost Recovery and Contribution*, *in* ENVIRONMENTAL LITIGATION 663, 674 (ALI-ABA Course of Study, June 23, 1997); *see, e.g.*, Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996); United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101-03 (1st Cir. 1994); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989).

146. 118 F.3d 1298 (9th Cir. 1997).

147. *Pinal Creek*, 118 F.3d at 1306.

148. *Id.* at 1305-06.

149. 30 F.3d 761 (7th Cir. 1994).

150. *Akzo*, 30 F.3d at 763.

151. 107 F.3d 1235 (7th Cir. 1997).

152. *Rumpke*, 107 F.3d at 1241-42.

153. *Id.* at 1241.

154. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997).

the issue.[155] Most circuit courts have not addressed the issue of prejudgment interest.[156] Some district courts, however, have awarded prejudgment interest for contribution claims.[157]

With the exception of the Third Circuit, no other circuit court has decided the issue of whether oversight costs are recoverable in private party contribution suits.[158] The Fifth Circuit ruled that the government may recover the cost of oversight from PRPs in a cost recovery action.[159] In *United States v. Lowe*, the court refused to follow the Third Circuit's reasoning in *Rohm & Haas*, citing *Atlantic Richfield* with approval.[160] The Fifth Circuit followed the Tenth Circuit's interpretation that CERCLA provides for recovery of any costs incurred as part of remedial action, including any "monitoring" necessary to protect the public health or environment.[161] Like the Tenth Circuit, the court found EPA oversight akin to monitoring, and thus recoverable as a necessary response cost.[162]

D. *Analysis*

The decisions in *Bancamerica*, *Atlantic Richfield*, and *Sun* reflect the Tenth Circuit's interest in mitigating some of the harsh and inequitable consequences of CERCLA liability. These decisions provide incentive for private parties to undertake cleanup of hazardous waste sites sooner rather than later. For instance, the court's decision in *Bancamerica* granting prejudgment interest for contribution claims is a logical attempt to reward parties who undertake cleanup before all PRPs are identified. To withhold prejudgment interest would, as the court pointed out, create a "perverse incentive" for PRPs to delay involvement in cleanups because they gain the time value of the money that would otherwise be spent on the cleanup.[163]

CERCLA can be unfair in its application because it allows a single PRP to be held liable for the entire cost of cleaning up a contaminated site to which there are potentially many contributors. Once the first PRP is identified and found liable, CERCLA places the burden on this PRP, rather than the EPA, to identify other PRPs and bring contribution ac-

155. *See* Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1496 (11th Cir. 1996); United Tech. v. Browning-Ferris Corp., 33 F.3d 96, 99-100 (1st Cir. 1994).

156. The Fifth Circuit, however, upheld the award of prejudgment interest in *Bell Petroleum Servs. Inc. v. Sequa Corp.*, 3 F.3d 889, 908 (5th Cir. 1993).

157. Browning-Ferris Indus. v. Ter Maat, 1996 WL 67216 (N.D. Ill. Feb. 16, 1996); Boeing Co. v. Cascade Corp., 920 F. Supp. 1121, 1139 (D. Or. 1996).

158. Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 568 (10th Cir. 1996).

159. United States v. Lowe, 118 F.3d 399, 404 (5th Cir. 1997).

160. *Id.* at 403-04.

161. *Id.* at 402-03; *see* 42 U.S.C. § 9601(24) (1994) (defining remedial action).

162. *Id.* at 401-03.

163. Bancamerica Commercial Co. v. Mosher Steel, Inc., 100 F.3d 792, 801 (10th Cir. 1996).

tions for the apportionment of costs.[164] If the initial PRP cannot recover prejudgment interest, CERCLA imposes a penalty on the first PRP held liable. This penalty is unnecessary and creates an incentive for a PRP to conceal its connection to the site. A PRP that is held liable for the entire cleanup cost is also penalized because, as determined in *Key Tronic Corp. v. United States*,[165] it may not recover the attorney's fees it incurred to litigate the contribution action.[166] Only nonlitigation costs, such as locating other PRPs, could be recovered.[167]

The court's decision in *Atlantic Richfield* allowing a liable PRP to recover the cost of EPA oversight from other PRPs in a contribution action[168] is also sensible. It mitigates the harshness of CERCLA liability, while encouraging a careful and thorough cleanup effort. To hold otherwise would again enforce an arbitrary penalty against those PRPs that are identified first, creating incentive for a PRP to hide its connection to a site until other PRPs had been identified and charged with cleanup costs.

The Tenth Circuit's decision in *Sun* is consistent with earlier holdings and CERCLA's goal of achieving an immediate response to hazardous substance releases because it encourages PRPs to undertake cleanup actions without prompting from EPA. If a PRP knows it will have more time to identify and bring suit against other PRPs, this may result in it voluntarily undertaking cleanup actions sooner. PRPs will have less hesitation to begin cleanup before other PRPs can be identified when *they* have less fear of being time-barred from bringing contribution suits in the future.

The Tenth Circuit has thus far been firm in holding cost recovery claims may not be brought by PRPs—an action for apportionment between PRPs is the "quintessential claim for contribution.[169] While the First Circuit has responded to the inequity of CERCLA liability by allowing certain PRPs that have paid more than their fair share of cleanup costs to bring section 107 cost recovery suits,[170] the Tenth Circuit has refused to allow PRPs to bring cost recovery actions in any situation.[171] Nevertheless, the court's decisions indicate a willingness to interpret CERCLA's liability provisions favorably for PRPs that have incurred more than their share of cleanup costs. The court's decision in *Sun* may be an extreme example of this willingness.

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164. Section 107 allows the EPA to hold any PRP liable for the entire cost of cleanup. Thus, there is little incentive for the EPA to identify more than one solvent PRP.

165. 511 U.S. 809 (1994).

166. *Key Tronic*, 511 U.S. at 818.

167. *Id.* at 820.

168. Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 571 (10th Cir.).

169. United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1536 (1995).

170. *Id.* at 1539.

171. *Id.* There may still be room, however, under the *Colorado & Eastern* decision for the court to find that certain "innocent" PRPs may bring a section 107 cost recovery action. *See supra* note 44.

The holding in *Sun* is not necessarily intuitive. The district court's assertion that the inapplicability of section 113(g)(3) (limitations period for contribution claims) was merely a drafting oversight[172] seems at least equally plausible. This is a natural conclusion to draw from the fact that section 113(g) (relating to limitations periods) is divided into separate sections entitled "Actions for recovery of costs" (section 113(g)(2)) and "Contribution" (section 113(g)(3)).[173] Thus, it seems likely that Congress intended to have different limitations periods for contribution and cost recovery claims.[174]

The Tenth Circuit's decision nevertheless promotes CERCLA's goal of achieving the prompt cleanup of hazardous substance releases, because it encourages responsible parties to undertake cleanup efforts sooner rather than later. The court was constrained by its earlier holding in *Colorado & Eastern* because Sun was clearly a responsible party, thus a cost recovery claim was not available. Sun was also, however, a cooperative party in achieving CERCLA's goal of initiating prompt response to the release of hazardous substances into the environment. The Tenth Circuit wisely chose to reward, rather than penalize, such efforts without compromising the distinction between cost recovery and contribution suits.

Arguably, this decision goes too far by putting responsible parties on par with those who are innocent or responsible, and who undertake cleanup without any prodding from the government.[175] Sun was neither an innocent party, nor was its cleanup completely voluntary. In fact, it was ordered by the EPA to begin cleanup after failing to reach a settlement.[176] There may be little difference between this sort of PRP and the PRP that undertakes cleanup only after negotiating a settlement with EPA. It seems clear that the PRP that is not proven liable, yet spontaneously undertakes cleanup without any government prodding, should be rewarded more so than PRPs such as Sun. The court has not yet addressed this issue. The court's decisions in *Sun* and *Colorado & Eastern*, however, may not have left any room to further reward such a PRP.[177] Despite this defect, *Sun* is still a sensible decision because it mitigates the harsh effects of CERCLA liability on those PRPs undertaking cleanup efforts with only a minimum of governmental prodding.

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172. Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1189 (10th Cir. 1997).
173. CERCLA § 113(g)(2)-(3), 42 U.S.C. § 9613 (g)(2)-(3) (1994).
174. *See* Garber, *supra* note 41, at 136-37.
175. *Id.* at 137.
176. Sun Co. (R&M) v. Browning-Ferris, Inc., 124 F.3d at 1189.
177. *But see supra* notes 44, 171.

II. PROCEDURAL INJURY AS A BASIS FOR ENVIRONMENTAL STANDING

A. *Background*

Standing is a constitutional doctrine of judicial restraint that has only recently attained much vigor.[178] Standing has three main requirements. First, the plaintiff must show an injury in fact which is concrete, particularized, and actual or imminent.[179] Generalized grievances shared by all are not sufficient to meet this standard.[180] Second, the plaintiff must show a causal connection between the injury and the offending conduct.[181] Finally, the injury must likely be redress by a favorable decision. In other words, the court must be able to provide a remedy that will cure the injury.[182]

These requirements make it difficult to challenge government action having diffuse impacts, or involving the cooperation of many agencies. For example, a plaintiff desiring to challenge an agency decision for failure to follow the procedure prescribed in its organic statute may find it difficult to show that failure to follow procedure will result in harm to a concrete and particularized interest. If the plaintiff can show a concrete injury fairly traceable to the agency's failure to follow procedure, redressability will still present a problem to the plaintiff because the only remedy a court may provide—a court order to the agency to follow procedure—will not necessarily change the agency's final decision.

Standing is often a formidable barrier for plaintiffs desiring to challenge decisions made by federal agencies concerning the management of public lands.[183] Many commentators believe that one Supreme Court decision in particular, *Lujan v. Defenders of Wildlife*,[184] has narrowed environmental standing considerably[185] and inhibits environmentalists' ability to air their grievances in federal court.[186] Standing analysis is difficult

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178. "Standing" is a relatively new issue. By 1992, the Supreme Court had mentioned standing in 117 cases; 109 of those cases occurred after 1965, and 55 cases occurred after 1985. Sunstein, *infra* note 185, at 169.

179. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

180. The injury in fact test may be traced to *Barlow v. Collins*, 397 U.S. 159 (1970). Sunstein, *infra* note 185, at 169.

181. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

182. *Id.* at 560-61 (citing *Simon*, 426 U.S. at 38, 43).

183. *See, e.g., id.* at 562-67 (holding that plaintiffs who had an interest in wildlife, and an intention to visit the habitat of the Nile crocodile some time in the future, was not enough to confer standing to challenge a decision by the Secretary of the Interior that might harm the endangered Nile crocodile); Lujan v. National Wildlife Federation, 497 U.S. 871, 887-89 (1990) (holding that plaintiffs who used land in the "vicinity" of an area of some two million acres did not have standing to challenge a Bureau of Land Management decision affecting only 4,500 acres within that area).

184. 504 U.S. 555 (1992).

185. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen's Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 164-66 (1992).

186. Brian J. Gatchel, *Informational and Procedural Standing After* Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 91 (1995).

under *Lujan* because the court tightened the requirements that plaintiff must meet to show a justiciable environmental injury in most cases, while alluding to relaxed standards for environmental injuries in other cases.

Congress, however, has expressed an intent to create standing for a large number of plaintiffs by including citizens' suit provisions in most environmental regulatory laws, as well as the Administrative Procedure Act.[187] These provisions generally provide that "any person aggrieved" by agency action has the right to judicial review.[188] Prior to *Lujan*, many courts had found standing for plaintiffs seeking to challenge procedural violations in agency decision making, based on these citizen suit provisions.[189] In *Lujan*, however, the Court made it clear that federal statutes alone do not confer standing.[190] Writing for the majority, Justice Scalia stated that standing is derived from Article III of the Constitution, and may not be granted by Congress without violating the separation of powers doctrine.[191] Congress may lower any prudential standing barriers with citizen's suit provisions, but may not lower constitutionally derived standing requirements.[192]

The Supreme Court, however, also recognized that Congress "may enact statutes creating legal rights, the invasion of which create [the foundation of] standing, even though no injury would exist without the statute."[193] For example, under the National Environmental Policy Act (NEPA), Congress mandated that federal agencies making certain management decisions must follow prescribed procedures, including public participation, and examination of alternatives identified in an environ-

187. Sunstein, *supra* note 185, at 164-66; *see* 5 U.S.C. § 702 (1994).

188. For example, section 702 of the Administrative Procedure Act states "A person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

189. Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation, in* ENVIRONMENTAL LITIGATION 1, 14 (ALI-ABA Course of Study, June 26, 1995). This fact prompted Justice Blackmun to dissent, arguing that the majority opinion "amounts to a slash and burn expedition through the law of environmental standing." *Lujan*, 504 U.S. at 606.

190. *Lujan*, 504 U.S at 576.

191. *Id.*

192. *Id.* at 577-78. Justice Scalia stated that standing is an essential element of the separation of powers doctrine. To allow Congress to grant standing would be to "discard[] a principle fundamental to the separate and distinct constitutional role of the Third Branch." *Id.* at 576. This is essentially the same view that Justice Scalia expressed in a 1983 law review article, in which he criticized cases granting environmental standing. *See* Sunstein, *supra* note 185, at 163.

193. Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

mental impact statement (EIS).[194] The violation of such procedures, such as a failure to prepare an EIS, results in a procedural injury.[195]

If an environmentalist plaintiff were allowed to substitute a procedural injury for injury in fact, the standing barriers to challenging an agency's decision based on its failure to follow decision making procedures would largely disappear, because the injury and redressability requirements are more easily met when the injury is defined as procedural, rather than factual.[196] Justice Scalia's majority opinion in *Lujan* made it clear that a plaintiff may not substitute procedural injury for injury in fact.[197] In a confusing and now famous[198] footnote[199] Justice Scalia acknowledged that procedural rights may afford a plaintiff special treatment under standing doctrine.[200]

Scalia wrote that "[t]here is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[201] Footnote seven, however, is confusing and raises more questions than it answers, since the court did not apply the standards it set forth;[202] it did not apply the standards because *Lujan* was not a procedural rights case.[203] Thus, the lower courts are given the task of interpreting and applying the standards it set forth.

Footnote seven did not expressly lower the injury in fact requirement.[204] Instead, Justice Scalia illustrated the dual standard for the requirement in a hypothetical involving the National Environmental Policy Act (NEPA).[205] He wrote that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot

194. NEPA requires agencies to consider the effects of their actions on the environment by preparing a detailed EIS, which must include a discussion of alternative proposals. 42 U.S.C. § 4332 (c) (1994).

195. Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223, 238 n.87 (1996).

196. *See* William M. Orr, Note & Comment, Florida Audubon Society v. Bentsen: *An Improper Application of* Lujan *to a Procedural Rights Plaintiff*, 15 PACE ENVTL. L. REV. 373, 375 (1997).

197. *Lujan*, 504 U.S. at 572.

198. The procedural standing mentioned in *Lujan* is now sometimes referred to simply as "footnote seven standing." Gatchel, *supra* note 186, at 91.

199. *Lujan*, 504 U.S. at 572 n.7.

200. Gatchel, *supra* note 186, at 91.

201. *Lujan*, 504 U.S. at 572 n.7.

202. Gatchel, *supra* note 186, at 108-09.

203. The Court expressly rejected the court of appeals finding of a procedural injury. *Lujan*, 504 U.S. at 572.

204. *See id.* at 572 n.7.

205. 42 U.S.C. §§ 4321-4347 (1994).

establish with any certainty[206] that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."[207] Thus, the hypothetical suggests that the actual harm requirement of the injury in fact element may be satisfied by showing the plaintiff's "geographical nexus"[208] to the affected area. Indeed, lower courts have generally held that a procedural injury must be accompanied by a showing that the plaintiff regularly uses, or lives adjacent to, the site of the challenged project.[209]

Justice Scalia argued that the "normal standards" for immediacy and redressability need not be met in a procedural injury claim, but he did not indicate whether these standards are eliminated or simply relaxed.[210] Examination of the hypothetical, however, suggests the immediacy requirement for procedural plaintiffs is virtually eliminated when plaintiffs do not control the timing of the injury, such as in the case of the dam scenario.[211] Some courts, including the Ninth Circuit, have dispensed with the immediacy requirement after deciding that footnote seven applies.[212]

Footnote seven is less clear about the redressability requirement. The dam hypothetical might be simply one example where the facts met a relaxed standard, or it might be interpreted to eliminate the standard altogether.[213] If footnote seven means the former, then it begs the following question: How distant or removed must an injury be before it is unredressable?[214]

Redressability and causation are closely related, and the plaintiff's ability to satisfy both elements depends on how the injury is defined. For example, if the injury is defined in terms of the government's failure to follow the law—as is the case with statutes like NEPA, which prescribes detailed procedures with which to make major federal land management decisions—the causation and redressability requirements are easily met in most cases.[215] If the agency fails to follow a prescribed procedure, the

206. NEPA requires only that agencies prepare an EIS, when necessary, to consider the alternatives to the proposed action, but does not mandate any particular decision to be made following this consideration. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 225 (1980).

207. *Lujan*, 504 U.S. at 572 n.7.

208. The term was first used by a court in relation to a procedural injury in *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). Orr, *supra* note 196, at 380.

209. *Id.* at 380-81.

210. Gatchel, *supra* note 186, at 91-92.

211. *Id.* at 99.

212. *Id.* at 100.

213. *Id.* at 108.

214. *See id.*

215. This is the approach taken by the Tenth Circuit in *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996). The court devoted most of its analysis to the injury in fact element. *Id.* at 448-51. Having established that the procedural injury shall be the foundation of the injury in fact element, the court decided the causation and redressability requirements with much less discussion. *Id.* at 451-52.

injury is directly traceable to the federal agency, and can be redressed by a court judgment that requires the agency to follow the prescribed procedure.

If the injury is defined in terms of the harm to the plaintiff's concrete interests, however, the plaintiff in a NEPA suit would be caught on the familiar horns of not being able to show that its factual injury (e.g., environmental degradation caused by completion of the project in question) is "fairly traceable" to the agency's failure to prepare an EIS.[216] Nor would the plaintiff be able to show that its injury is redressable because the district court could not order the agency to make any particular decision regarding the project following consideration of the EIS.[217]

Ambiguity arises because the determination of causation and redressability is critically related to how the injury is defined. Footnote seven, however, does not clarify this relationship, nor does it even mention causation. Thus, the footnote does little more than affirm that a procedural injury claim does exist for claims brought under NEPA, without articulating the reasons why.[218] For this reason, it does not provide a workable framework for evaluating procedural injuries that might be recognized under other action-forcing statutes similar to NEPA, such as the National Forest Management Act of 1976.[219] Consequently, the lower courts have taken slightly different paths in interpreting footnote seven standing.[220] For example, the D.C. Circuit has distinguished cases in which a plaintiff alleged injury stemming from broad programmatic decisions, from cases in which the plaintiff challenged an action directed at a specific decision made.[221] The court imposed stricter requirements in the former case.[222]

The Tenth Circuit, in *Committee to Save the Rio Hondo v. Lucero*,[223] clarified footnote seven and provided a workable procedural standing analysis framework by defining injury in fact as a two part test.[224] The test

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216. *See* Sunstein, *supra* note 185, at 225.

217. *See id.*

218. *Id.*

219. 16 U.S.C. § 1600 (1994). The Act directs the Forest Service to develop land and resource management plans ("forest plans") for each forest unit in the National Forest System. 16 U.S.C. § 1604 (1994).

220. Beers, *supra* note 189, at 14. *Compare* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (holding that an environmental group had Article III standing to challenge a decision of the Committee "if for no other reason than that they allege procedural violations in an agency process in which they participated"), *with* Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 810 (11th Cir. 1993) (denying standing to a council of timber purchasers to challenge actions taken by the Forest Service because the injuries asserted by the council to its rights to participation and informed decision-making were generalized grievances that do not confer Article III standing).

221. Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 667 (D.C. Cir. 1996); *see infra* notes 267-72 and accompanying text.

222. *Florida Audubon Soc'y*, 94 F.3d at 667.

223. 102 F.3d 445 (10th Cir. 1996).

224. *Rio Hondo*, 102 F.3d at 449.

requires the plaintiff to prove 1) that the agency's failure to follow procedure results in increased environmental risk and 2) that its concrete interests are harmed by that increased risk.[225] Thus, in NEPA cases, the injury in fact requirement will be met if the plaintiff can show a geographical nexus to an area that will be subjected to increased environmental risk due to an agency's uninformed decision making. The causation and redressability elements are then satisfied in terms of the procedural injury, rather than in terms of harm to the plaintiff's concrete interests.[226] The court has yet to address the broader issue of procedural standing for claims brought under statutes other than NEPA.[227] Nevertheless, as explained below, the court did present a workable procedural injury framework under which plaintiffs may be able to use procedural standing to challenge a broader range of land agency decisions.

B. Committee to Save the Rio Hondo v. Lucero[228]

1. Facts

Taos Ski Valley, which operates a ski area by permit within National Forest lands in New Mexico, proposed to expand the operation of its facilities so as to include summertime use.[229] In considering the request, the Forest Service prepared an environmental assessment[230] in order to analyze the impact the proposed expansion would have on the environment. Based on the assessment, the Carson National Forest supervisor prepared a finding of no significant impact (FONSI)[231] and approved the proposed summertime expansions.[232]

The Committee to Save the Rio Hondo (Committee) brought this action claiming that the Forest Service had failed to follow NEPA procedures when it approved the ski area's summertime expansion.[233] The ski

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225. *Id.* at 449-51.

226. *Id.* at 451-52.

227. The Tenth Circuit decided one other case involving a procedural injury claim brought under NEPA. Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996). This opinion contained a relatively brief discussion of the standing issue and did not elaborate on the injury in fact test. *Id.* at 1433-34.

228. 102 F.3d 445 (10th Cir. 1996).

229. *Rio Hondo*, 102 F.3d at 446.

230. *Id.* "An environmental assessment contains a less exhaustive environmental analysis than does an environmental impact statement." *Id.* It is used by the agency to determine whether a full EIS is necessary. 40 C.F.R. §§ 1501.4(b), (c), 1508.9 (1997).

231. The issuance of a FONSI is a finding that preparation of an EIS is not necessary. It is usually the last NEPA action on a project. 40 C.F.R. §§ 1501.4(e), 1508.13 (1997).

232. *Rio Hondo*, 102 F.3d at 446.

233. The court stated:

> The Committee claimed the Forest Service's approval of the amended master plan and special use permit was either a 'major Federal (sic) action significantly affecting the . . . environment' requiring the Forest Service to prepare an environmental impact statement, or the approval was a 'substantial change' to the plan, requiring the Forest Service to prepare a supplemental environmental impact statement.

area moved to dismiss the Committee's claim for lack of standing.[234] In response, the Committee filed affidavits from two of its members that claimed they used and enjoyed the land and water surrounding the ski area for recreation, and that their use and enjoyment would be damaged by year-round operation of the ski area.[235]

The district court found that the Committee lacked standing because it had not shown either sufficient injury in fact, or redressability.[236] The injury was too speculative because the Committee could not prove that the agency's decision would change if proper NEPA procedure had been followed.[237] The court also found that the Forest Service had complied with NEPA by completing an environmental assessment, and therefore, that a favorable decision would not redress the Committee's injuries.[238]

2. Decision

The Tenth Circuit reversed, finding that the Committee's claim satisfied the prudential "zone of interests" test,[239] and that it had also met all three requirements of constitutional standing.[240] The court began by acknowledging that a NEPA procedural injury may be the foundation for injury in fact.[241] The court classified the injury in fact requirement as a two-prong test:[242]

> [First,] the litigant must show that in making its decision without following [NEPA] procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and [second] the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.[243]

Id. at 447 (citing 42 U.S.C. § 4332(2)(C)(i-v) (1994) and 40 C.F.R. § 1502.9(c)(1)(i) (1995)).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* NEPA requires only that alternatives be identified and considered, but does not mandate any particular decision. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980).

238. *Rio Hondo*, 102 F.3d at 477. The court of appeals found the Committee's injury was redressable but did not rule on the question of whether the Forest Service had already complied with NEPA. *Id.* at 453.

239. The zone of interest is a fourth element of standing doctrine, however, it is judicially-created rather than based upon the Constitution. Bennet v. Spear, 117 S. Ct. 1154, 1161 (1997). Because NEPA does not contain a private right of action, plaintiffs must rely on section 702 of the Administrative Procedure Act to gain the right of judicial review. *Rio Hondo*, 102 F.3d at 448. The court found the Committee had properly alleged it was adversely affected by some final agency action within the meaning of NEPA because the Committee sought to protect its recreational and aesthetic interests in the land and water, and their alleged injuries fall within the zone of interests that NEPA was designed to protect. *Id.*

240. *Rio Hondo*, 102 F.3d at 448-52.

241. *Id.* at 449 (citing Douglas County v. Babbit, 48 F.3d 1495, 1499-1501 (9th Cir. 1995)).

242. *Id.*

243. *Id.*

The court found that the plaintiff satisfied the first prong because increased environmental risk would result from the agency's uninformed decision making.[244] The court determined that the second prong was satisfied because the Committee had showed that its members actually used the area and, therefore, could show a risk of environmental harm to a particularized and concrete interest.[245]

The court found that the Committee satisfied the causation requirement because the increased risk was "fairly traceable to the agency's alleged failure to follow [NEPA] procedures."[246] The court then indicated that the injury resulted not from the agency's decision, but from the agency's uninformed decision making.[247] The court specifically rejected a D.C. Circuit opinion holding that the test for causation required the plaintiff to show a demonstrable risk to his particularized interests.[248] The Tenth Circuit indicated that this analysis confused the issue of the likelihood of the harm (better addressed in the injury in fact requirement) with its cause.[249] Whether an increased risk will or will not occur due to the agency action determines whether a plaintiff has suffered injury in fact, *not* causation.[250]

Because the injury was so defined, the court found that it would be redressed by a favorable judgment.[251] "That the Forest Service may not change its decision to allow summertime operations at the ski area after preparing an [EIS] is immaterial."[252] What was important was that the Committee had established that its injury would be redressed by a judgment requiring the Forest Service to comply with NEPA procedure.[253]

C. *Other Circuits*

Given the Supreme Court's scant explanation of procedural standing in *Lujan*,[254] it is not surprising that the lower courts have diverged when interpreting standing requirements for procedural injury cases. The Ninth Circuit has generally been enthusiastic in recognizing standing based on footnote seven.[255] In *Douglas County v. Babbit*,[256] that court granted standing to the county to challenge the Secretary of the Interior's deci-

244. *Id.*
245. *Id.* at 451.
246. *Id.* at 452 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)).
247. *Id.*
248. *Id.*
249. *Id.* at 451.
250. *Id.*
251. *Id.* at 454.
252. *Id.* at 452.
253. *Id.*
254. *Lujan*, 504 U.S. at 572.
255. Yumee A. Shim, Mountain States Legal Foundation v. Glickman*: When a Tree Falls in the Forest, Is Anything Left (of) Standing?*, 15 TEMP. ENVTL. L. & TECH. J. 277, 295 (1996).
256. 48 F.3d 1495 (9th Cir. 1995).

sion to designate certain federal land as critical habitat for the Northern Spotted Owl because the plaintiff showed that sufficient injury to concrete, particularized interests had a reasonable probability of occurrence.[257] The court quoted the language of footnote seven, stating that the normal standards of redressability and immediacy are relaxed.[258] It acknowledged the uncertainty of whether the plaintiff's concrete interests would be affected by the Secretary's decision to designate land as critical habitat, but stated this concern was "not important."[259] Thus the Ninth Circuit approach related the causation and redressability requirements to the plaintiff's concrete injury, but relaxed the standards for both elements to one of "reasonable probability."[260]

The D.C. Circuit has taken both restrictive and expansive views of footnote seven standing. In *Moreau v. F.E.R.C.*,[261] the court held that the plaintiff had standing to challenge the Federal Energy Regulatory Commission's decision to build a pipeline, based on the agency's failure to give the plaintiff proper notice of a public hearing regarding the construction.[262] The court noted that redressability of the plaintiff's injuries would be highly unlikely,[263] yet this was not fatal under the footnote seven standard of redressability.[264] Thus, the Ninth and D.C. Circuits applied a relaxed, but undefined, standard for causation and redressability that relates the injury to the plaintiff's concrete interests.[265]

The D.C. Circuit, however, has distinguished cases in which the plaintiff alleged injury premised upon broad rulemaking, from cases in which the plaintiff challenges an action at a particular location.[266] In *Florida Audubon Society v. Bentsen*,[267] the court noted that the standard is stricter in cases involving the former.[268] *Bentsen* involved a challenge to the Secretary of the Treasury's decision to expand a tax credit for ethanol made from corn and other crops.[269] The plaintiff first argued that NEPA required the secretary to prepare an EIS before making this decision. Secondly, the tax credit would increase the production of crops, which would cause environmental harm to land that the plaintiffs used.[270] The court held that in this situation, standing required the plaintiff to show a particularized, demonstrable injury, fairly traceable to the act of the

257. *Douglas County*, 48 F.3d at 1501.
258. *Id.*
259. *Id.*
260. *Id.* at n.6.
261. 982 F.2d 556 (D.C. Cir 1993).
262. *Moreau*, 982 F.2d at 567.
263. *Id.* at 565.
264. *Id.* at 567.
265. *See* Gatchel, *supra* note 186, at 102-06.
266. *See* Orr, *supra* note 196, at 390.
267. 94 F.3d 658 (D.C. Cir. 1996).
268. *Florida Audubon Soc'y*, 94 F.3d at 667.
269. *Id.* at 662.
270. *Id.*

agency, and substantially probable to cause the injury.[271] By adding a demonstrable injury requirement and refusing to relax the redressability and causation requirements as suggested in footnote seven, the court made it substantially more difficult for plaintiffs who challenge programmatic decisions, or decisions with diffuse impacts, to establish standing.[272]

D. *Analysis*

Footnote seven in *Lujan* made it clear, without articulating why, that plaintiffs who use or live near land which is the site of a proposed project that will be affected by an agency decision will have standing to force the agency to follow proper NEPA procedure.[273] Thus, *Rio Hondo* was not a difficult case to decide because its facts so closely paralleled the hypothetical in footnote seven.[274] *Rio Hondo* is important, however, because the court recognized a two-part test for procedural injury claims like those brought under NEPA:[275] (1) The plaintiff must first establish that the agency's failure to follow procedure will result in a procedural injury that will affect its concrete interests; and (2) thereafter, the injury will be defined in terms of procedural injury for purposes of immediacy, redressability, and causation.[276] This makes the injury in fact requirement the most important element of environmental standing, because redressability and causation will be easily satisfied in most cases where the agency that is required to follow procedure is a party to the case.[277]

The court's interpretation, although logical, is not necessarily supported by a strict application of the language in footnote seven. The footnote suggests that a person who has been accorded a procedural right through action-forcing statutes like NEPA, may enforce this right to protect a concrete interest "without meeting all the normal standards for redressability and immediacy."[278] The *Rio Hondo* decision, however, applies normal standards, but applies them to the procedural injury, rather than to the concrete interests injury.

Nothing in footnote seven or the majority opinion in *Lujan* suggests that the immediacy and redressability standards should be applied to the procedural injury. Indeed, there would be no need to discuss special

271. *Id.* at 666 (emphasis added).

272. *See* Orr, *supra* note 196, at 397-98.

273. *See* Sunstein, *supra* note 185, at 225.

274. *Id.*

275. Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996).

276. *Id.* at 451-52.

277. Redressability will be a problem in a relatively few number of cases where the agency that must follow the procedure is not a party to the suit, as in *Lujan v. Defenders of Wildlife*. *See* Gatchel, *supra* note 186, at 97-98. The United States Fish and Wildlife Service was the agency that failed to consult with the Secretary of the Interior, and it was not a party to the case. The district court could order the agency to follow procedure only if it was a party to the case. *Id.*

278. Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

standards for immediacy and redressability were this so. If the foundational injury is the procedural violation, the injury is suffered as soon as the procedure is violated; furthermore, the harm is clearly redressable by a court order to follow procedure. It only becomes necessary to lower the redressability and immediacy standards when they are related to a factual injury rather than a procedural injury.

Clearly, footnote seven is difficult to apply to procedural standing cases because its standards are explained only in terms of a hypothetical, and are not applied elsewhere in the opinion.[279] The footnote's emphasis on special immediacy and redressability standards, however, indicates an intent to apply these standards to the ultimate harm (construction of the dam), not the procedural violation.[280] The D.C. Circuit also focused on the probability that the ultimate harm will be redressed in cases involving challenges to broad programmatic decisions.[281] Thus, by making the procedural injury the foundation of injury in fact, the Tenth Circuit may have misapplied the footnote. Nevertheless, the Tenth Circuit's approach is more logical, and comes closer to expressing a workable test than the unarticulated standards of footnote seven.

Under the decision in *Rio Hondo,* the important nexus is between the agency's failure to follow procedure and the harm to the plaintiff's concrete interests. If the plaintiff can show the procedural failure results in harm to her concrete interests, then the elements of causation and redressability are applied to the procedural injury rather than the injury to concrete interests. Although the Tenth Circuit did not acknowledge this fact, the *Rio Hondo* approach essentially incorporates much of the traditional causation element into the injury in fact test. The critical reason for ruling in the Committee's favor was the court's finding that failure to follow NEPA procedure would cause increased environmental risk to the Rio Hondo watershed.[282] The Committee could then prove harm to its concrete interests by showing its members had used the watershed for much of their lifetimes, and planned to continue to use the area in the future.[283]

The court's approach comports with the footnote seven standard in that it essentially reduces the redressability requirement for standing under NEPA. If this were not so, NEPA claims would otherwise fail due to the fact that it requires the agency to follow certain decision making procedure, but does not mandate any particular outcome.[284] Under *Rio Hondo,* the redressability requirement has bite only in the rare situation where the agency that must follow the procedure is not a party to the

279. *See* Sunstein, *supra* note 185, at 225.
280. Gatchel, *supra* note 186, at 102-03.
281. *See supra* notes 266-72.
282. Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448-49 (1996).
283. *Id.* at 450.
284. *See supra* note 235.

case. More importantly, the causation requirement, which footnote seven does not expressly relax, is essentially kept intact—it is incorporated into the injury in fact test. The injury in fact test in *Rio Hondo* can only be met if the court finds the agency's failure to follow procedure caused harm to the plaintiff's concrete interests.[285]

The *Rio Hondo* opinion is significant for two reasons. First, the court recognized that a procedural injury may be the foundation for a claim brought under NEPA.[286] This lowers the barriers that the requirements of redressability and causation traditionally imposed on claims based on procedure-enforcing statutes like NEPA. Second, the court expressly found that the agency's failure to follow procedure would result in increased environmental risk. To establish standing, the plaintiff merely had to show its members had a geographical nexus to the area at risk in order to show injury to its concrete interests. Therefore, *Rio Hondo* provides a clear step-by-step process that plaintiffs can follow to prove standing under NEPA, and other action-forcing statutes, like the National Forest Management Act (NFMA),[287] or the Federal Land Policy and Management Act.[288]

First, the plaintiff must show sufficient connection with the managed area to satisfy the geographical nexus test. Second, the plaintiff must show that its concrete interests are injured by some failure of the agency to follow the mandates of the law. The description of the injury is critical to establishing this part of standing.[289] The plaintiff should phrase the injury in terms of harm to some concrete opportunity that is protected by the agency's procedural statute, such as some injustice the statute was designed to prevent.[290] In cases involving failure to follow NEPA procedure, this will usually mean characterizing the harm as increased environmental risk resulting from uninformed decision making. For claims challenging planning decisions under statutes like the NFMA, this may

285. *Rio Hondo*, 102 F.3d at 449.

286. *Id.*

287. Congress initially enacted the Forest and Rangeland Renewable Resources Planning Act of 1974. 16 U.S.C. § 1600 (1994). NFMA was enacted in 1976, in an amendment to the Resources Planning Act, 83 Stat. 852 (codified in scattered sections of 16 U.S.C.). The Act directs the Forest Service to develop land and resource management plans ("forest plans") for each forest unit in the National Forest System. 16 U.S.C. § 1604 (1994). The plans must also be prepared in accordance with NEPA. *Id.*

288. 43 U.S.C. §§ 1701-1782 (1994). The Act was signed into law the same day as NFMA, and prescribes planning procedures for the Bureau of Land Management.

289. Murphy, *supra* note 195, at 255.

290. *Id.* This not only assures redressability, but is necessary for statutes like NEPA and NFMA, which do not contain citizen suit provisions. *Id.* For injuries under these statutes, the right to judicial review must be achieved by reliance upon the Administrative Procedure Act, which requires the injury to be contemplated "within the meaning of the relevant statute." 5 U.S.C. § 702 (1994).

mean phrasing the injury as the lost opportunity to appreciate a forest, an interest acknowledged by NFMA.[291]

The Tenth Circuit has not addressed standing for procedural injury claims brought under statutes other than NEPA. Other circuits that have addressed the issue are split.[292] The Tenth Circuit's clear affirmation of procedural rights based upon NEPA claims, however, may signal a willingness to recognize standing for plaintiffs alleging procedural injuries based upon other statutes, and using the two-prong injury in fact test. Without deciding the issue of procedural standing under other statutes, *Rio Hondo* nevertheless strengthens procedural standing for environmental plaintiffs by providing a clear blueprint to follow in bringing procedural injury claims in the future.

CONCLUSION

CERCLA is a powerful statute that imposes enormous liability on a party that may be only partially responsible for the contamination of a site. Although CERCLA cases are likely to become less frequent in the future,[293] it remains important for courts to reduce disincentives to undertake the cleanup of hazardous substance releases that occurred in the past. The powerful sword of strict, and joint and several liability is needed to accomplish the difficult task of cleaning up contaminated sites. Yet it would be foolish to wield this sword in such a way as to encourage PRPs to hide their connection to a site or delay the cleanup of such a site for as long as possible. The decisions in the three recent CERCLA cases discussed indicate the Tenth Circuit's cognizance of CERCLA's sword-like qualities. These cases show wise restraint on the part of the court, which avoids penalizing PRPs unnecessarily.

With regard to standing for environmental plaintiffs, *Rio Hondo* involved NEPA claims factually similar to the dam hypothetical in footnote seven of *Lujan*. For this reason, *Rio Hondo* did not expand Tenth Circuit procedural standing outright. The Tenth Circuit has yet to grant standing for any procedural injury beyond NEPA claims. Yet *Rio Hondo* offers hope for plaintiffs wishing to bring procedural injury claims under other action-forcing statutes like NFMA. The opinion eliminates much of

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291. Murphy, *supra* note 195, at 255; *see* National Forest Management Act, 16 U.S.C. §§ 1600, 1604(e), 1604(g) (1994).

292. *Compare* Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994) (holding that environmental plaintiffs could not challenge a forest plan because the plan "does not effectuate any on-the-ground environmental changes," and, therefore could not be the basis for injury), *with* Resources Ltd. v. Robertson, 8 F.3d 1300, 1307-08 (9th Cir. 1993) (holding that the procedural standing requirements for claims brought under the NFMA are similar to the standards of NEPA claims, because Congress intended procedural safeguards to be similar in the two, and in this case those procedural requirements had been satisfied by the plaintiffs).

293. CERCLA liability is widely known and offers powerful incentive for PRPs to prevent releases of hazardous substances in the future. Thus, as cleanup of old sites continues, the number of newly contaminated sites should decrease over time.

the confusion surrounding footnote seven standing, and focuses the plaintiff's attention on establishing the elements of the two-part injury in fact test. *Rio Hondo* may have laid the groundwork necessary for plaintiffs to use NFMA to challenge an agency's decision. It may now be possible to present a well-fashioned argument that the agency's failure to follow NFMA procedure will result in a lost opportunity to appreciate a forest, or similar injury to a concrete interest that the statute sought to prevent.

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